

# **SUPERIOR COURT OF CALIFORNIA**

**County of San Diego**

**DATE: December 11, 2006      DEPT. 71      REPORTER A:      CSR#**

**PRESENT HON. RONALD S. PRAGER      REPORTER B:      CSR#**

**JUDGE**

**CLERK: K. Sandoval**

**BAILIFF:      REPORTER'S ADDRESS: P.O. BOX 120128  
SAN DIEGO, CA 92112-4104**

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**IN RE: JCCP 4221/4224/4226&4428 – Natural Gas Anti-Trust Cases (Price Indexing)**

**The attached Court's TENTATIVE RULING OF CLASS ACTION SETTLEMENT AND MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS ruling regarding applies to all cases listed as follows:**

<b>4221-00020</b>	<b>UYEDA vs CENTERPOINT ENERGY INC</b>
<b>4221-00021</b>	<b>BENSCHIEDT vs AEP ENERGY SERVICES INC</b>
<b>4221-00022</b>	<b>COUNTY OF SANTA CLARA vs SEMPRA ENERGY</b>
<b>4221-00023</b>	<b>CITY AND COUNTY OF SAN FRANCISCO vs SEMPRA ENERGY</b>
<b>4221-00024</b>	<b>COUNTY OF SAN DIEGO vs SEMPRA ENERGY</b>
<b>4221-00025</b>	<b>OLDER vs SEMPRA ENERGY</b>
<b>4221-00026</b>	<b>CITY OF SAN DIEGO vs SEMPRA ENERGY</b>
<b>4221-00027</b>	<b>TAMCO vs DYNEGY INC</b>
<b>4221-00028</b>	<b>A L GILBERT COMPANY vs CORAL ENERGY RESOURCES LP</b>
<b>4221-00029</b>	<b>OBERTI WHOLESALE FOOD INC vs ENCANA ENERGY SERVICES INC</b>
<b>4221-00030</b>	<b>BROWN vs ENCANA ENERGY SERVICES INC</b>
<b>4221-00031</b>	<b>LOIS THE PIE QUEEN vs ENCANA ENERGY SERVICES INC</b>
<b>4221-00032</b>	<b>VITTICE CORPORATION vs ENCANA CORPORATION</b>
<b>4221-00033</b>	<b>COUNTY OF ALAMEDA vs SEMPRA ENERGY</b>
<b>4221-00034</b>	<b>THE REGENTS OF THE UNIVERSITY OF CALIFORNIA vs RELIANT ENERGY SERVICES INC</b>
<b>4221-00035</b>	<b>SCHOOL PROJECT FOR UTILITY RATE REDUCTION vs SEMPRA ENERGY</b>
<b>4221-00036</b>	<b>ASSOCIATION OF BAY AREA GOVERNMENTS vs SEMPRA ENERGY</b>
<b>4221-00037</b>	<b>OWENS-BROCKWAY GLASS CONTAINER INC vs SEMPRA ENERGY</b>
<b>4221-00038</b>	<b>TEAM DESIGN DBA TIMOTHY ENGELN INC vs RELIANT ENERGY INC</b>
<b>4221-00039</b>	<b>CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER vs RELIANT ENERGY SERVICES INC</b>
<b>4221-00040</b>	<b>SACRAMENTO MUNICIPAL UTILITY DISTRICT vs RELIANT ENERGY SERVICES INC</b>
<b>4221-00041</b>	<b>SHANGHAI 1930 RESTRAURANT PARTNERS LP vs ENCANA ENERGY SERVICES INC</b>

**4221-00042     PODESTA vs ENCANA ENERGY SERVICES INC**  
**4221-00044     COUNTY OF SAN MATEO vs SEMPRA ENERGY**  
**4221-00045     BUSTAMANTE vs WILLIAMS ENERGY SERVICES**  
**4221-00046     PABCO BUILDING PRODUCTS vs DYNEGY INC**  
**4221-00047     BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY vs DYNEGY INC**  
**4221-00043     NURSERYMAN'S EXCHANGE OF HALF MOON BAY vs SEMPRA ENERGY**

The Court rules on Class Plaintiffs' motion for final approval of class action settlement and for award of attorneys' fees and costs as follows:

#### Final Approval of Class Action Settlement

On September 1, 2005, this Court entered the Order Granting Preliminary Approval of Class Action Settlements ("Preliminary Approval Order), preliminarily approving the proposed settlements, provisionally certifying the settlement class and two subclasses, directing the form and manner in which notice would be disseminated to class members, and establishing procedures and deadlines for class members to opt-out of the class or submit objections to the proposed settlements. The Court set the deadline for publishing and mailing notice to the class for October 11, 2006. See Preliminary Approval Order, ¶¶5-6. The Preliminary Approval Order and notices set November 15, 2006, as the deadline for class members to mail any requests for exclusion or file and mail any objections to the settlement. Id. at ¶¶12 and 19.

When considering a motion for final approval of class action settlement, a court's inquiry is whether the settlement is "fair, adequate, and reasonable." See Dunk v. Ford Motor Co. (1996) 48 Cal. App. 4<sup>th</sup> 1794, 1801 n. 7. A settlement is fair, adequate and reasonable, and merits approval when "the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." See Federal Judicial Center, Manual for Complex Litigation, Fourth (MCL 4th) (2004) §21.61. "The trial court operates under a presumption of fairness when the settlement is the result of arm's length negotiations, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, counsel are experienced in similar litigation, and the percentage of objectors is small." See In re Microsoft I-V Cases (2006) 135 Cal. App. 4<sup>th</sup> 706, 723. The trial court has broad discretion to determine whether the settlement is fair. See Dunk, supra, 48 Cal. App. 4<sup>th</sup> at 1801.

The factors considered in deciding whether to grant final approval to a class action settlement include: (1) the amount offered in settlement; (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage of the proceedings when settlement was reached; (4) the complexity, expense and likely duration of the litigation absent settlement; (5) the experience and views of Class counsel; and (6) the reaction of Class members. See Dunk, supra, 48 Cal. App. 4<sup>th</sup> at 1801. The Court finds those factors have been satisfied as summarized below.

*First Factor—Amount of Settlement.* The amount of the settlement, \$92.1 million in cash, is sufficient in light of the circumstances surrounding the action. This settlement in conjunction with the settlement amounts obtained in the El Paso settlement and the Semptra settlement will result in the receipt of approximately \$252 million to the Core Natural Gas Subclass Members and \$271 million to the Non-Core Natural Gas Subclass members for a grand total of \$523 million.

*Second Factor—Risks Inherent in Continued Litigation.* The risks facing the Class Plaintiffs included well funded defendants and great uncertainty in the outcome of the litigation at trial and on appeal.

*Third Factor—Discovery and Stage of the Proceeding.* The settlements were reached after more than three years of extensive investigation, formal and informal discovery, and contentious litigation.

*Fourth Factor—Complexity, Expense and Likely Duration of the Litigation Absent Settlement.* As noted above, the settlements guarantee a substantial recovery for the Class while obviating the need for lengthy, uncertain, and expensive pretrial practice, trial, and appeals.

*Fifth Factor—Experience and Views of Class Counsel.* Co-Lead Class Counsel have been involved in California energy litigation for six years, have been counsel in each of the other California natural gas and electricity class action settlements arising from the energy crisis, and are some of the most experienced class action and antitrust attorneys in California and the United States.

*Sixth Factor—Reaction of Class Members.* In this case, none of the members of the settlement class has objected to the settlements and only thirteen requests for exclusion from the Settlement Class have been received. See Kennedy Supplemental Declaration, Exhibits 2-4, 6, and 10. In addition, three utilities and twelve governmental entities, which are not members of the Settlement Class, filed requests for exclusion. *Id.* at Exhibits 5-9. When relatively few class members object to or exclude themselves from a class action settlement, courts interpret that response as evidence that the settlement warrants final approval. See e.g., *Stoetznier v. U.S. Steel Corp.* (3<sup>rd</sup> Cir. 1990) 897 F. 2d 115, 118-119 (court found that objections by 29 members out of a settlement class of 281 or 10% “strongly favors settlement”).

Based on the factors detailed above, the Court grants the request for final approval of the class action settlement. The Court directs Class Plaintiffs’ counsel to prepare an Order in accordance with the ruling herein.

#### Application for Attorneys’ Fees and Costs

The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.” See *Serrano v. Priest* (1977) 20 Cal. 3d 25, 49.

Both California state and federal courts recognize two methods for evaluating the fairness and reasonableness of attorneys’ fees in class action settlements resulting in the creation of a common fund for the distribution to class members: (1) the percentage-of-the-benefit method; or (2) the lodestar method plus multiplier method. See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4<sup>th</sup> 224, 254.

*Percentage-of-the-Benefit Method.* It is customary in percentage-of-the-benefit cases that attorneys fees are awarded based on 25 percent to 30 percent of the benefit received by the class. See *In re Activision Sec. Litig.* (N.D. Cal. 1989) 723 F. Supp. 1373, 1378-1379 and *Staton v. Boeing Co.* (9<sup>th</sup> Cir. 2003) 327 F. 3d 938, 968. Here, Class Plaintiffs’ counsel seeks \$26,699,828.00 of the \$92.1 million settlement consideration. This falls within the percentages awarded in other class action litigation in California and in other jurisdictions.

*Lodestar/Multiplier Method.* The factors considered are: (1) the continuing obligation of plaintiffs’ counsel to devote time and effort to the litigation; (2) the extent to which the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee agreement, both from the point of view of eventual success on the merits and securing a fee

award; (4) the experience, reputation, and ability of the attorneys who performed the services, and the skill they displayed in litigation, and (5) the amount involved and the results obtained on behalf of the class by plaintiffs' counsel. See Serrano, supra, 20 Cal. 3d at 49. However, no rigid formula applies and each factor should be considered only "where appropriate." See Dept. of Transp. V. Yuki (1995) 31 Cal. App. 4<sup>th</sup> 1754, 1771; See also Serrano, supra, 20 Cal. 3d at 49.

The Court finds the requested fees are reasonable and appropriate for the reasons stated below.

*First Factor—Time and Effort Litigating Case.* Class Plaintiffs' counsel report a lodestar benefiting the class of \$11,500,751.05. See Himmelstein Fee Declaration, ¶8. Discovery and briefing were coordinated as effectively as possible. While some duplication of effort was inevitable, counsel divided responsibilities for pursuing discovery, responding to discovery requests, drafting motions, working with experts, communicating with Defendants, and drafting settlement documents.

*Second Factor—Preclusion of Other Employment.* Class Plaintiffs' counsel was precluded from accepting other work as a result of their performance of 31,019 hours of service over 3.5 years, will continue to forego other cases, and have devoted substantial resources to the investigation, litigation, and negotiation required to achieve and implement the settlement.

*Third Factor—Contingent Nature of the Fee Agreement.* Class Plaintiffs' counsel agreed to represent their clients on a contingent basis.

*Fourth Factor—Experience, Reputation, and Ability of Counsel.* Class Plaintiffs' counsel's skills in developing evidence, obtaining remand from federal court, defeating demurrers involving novel preemption, filed-rate doctrine and UCL arguments, briefing class certification, working with experts, and successfully navigating the complex federal and state judicial and regulatory framework traversed by this case were essential to achieving these settlements.

*Fifth Factor—Amount Involved and Results Achieved.* As noted above, the Settling Defendants agreed to pay \$92.1 million for the benefit of the Class.

Therefore, the Court grants the motion for attorneys' fees as requested.

*Multiplier.* In addition, California courts have been expressly authorized to adjust the multiplier upward to approximate a "percentage fee[] freely negotiated in comparable litigation." See Lealao v. Beneficial Cal., Inc. (2000) 82 Cal. App. 4<sup>th</sup> 19, 49-50. This Court and numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees. See Natural Gas Antitrust Cases, I-IV (December 10, 2003) and Natural Gas Antitrust Cases, I-IV (June 27, 2006) (Prager, J.). Based on the foregoing, the Court finds that a multiplier of 2.36 is warranted in this case.

*Reimbursement of Costs.* "[T]he prevailing view is that expenses are awarded in addition to the fee percentage" [See Conte, Attorney Fee Awards, §2.08 at pp. 50-51 (2d ed. 1977)] and are routinely reimbursed in contingency cases (See In re Businessland Sec. Litig., Case No. 90-20476 RFP, slip. Op. at 4 (N.D. Cal. 1991)). The Court grants the request for reimbursement of expenses totaling \$930,172.00 incurred in this case. See Himmelstein Fee Declaration, ¶8; See Reply Brief, p. 3.

*Incentive Award.* The Court also grants the request for incentive fees totaling \$45,000.00, to be paid out of the \$92.1

million settlement fund, for each of the named class representatives in the amount of \$5,000.00 for those who were (or are about to be) deposed, and \$2,500.00 for those who were not. There was no opposition to the award of these incentive fees.

**IT IS SO ORDERED.**

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